

ACCIDENTAL CARCERAL SUBJECTS: REASSESSING THE PRISON NURSERY MODEL IN INDIA

STUTI SHAH*

Abstract

This Article critically examines the Indian prison nursery model from a sociolegal perspective. Although framed as a reform to uphold child rights, the policy of allowing children to live with their incarcerated mothers until the age of six obscures the inherently punitive and harmful nature of carceral institutions to these children.

The Article argues that the purported “choice” mothers have to keep their children with them in prison is profoundly shaped by structural inequality—while women with access to resources may arrange external care, those without are left with no meaningful alternative. This coerced caregiving compromises children’s constitutional rights and situates maternal labor within carceral control. The Article also critiques the state’s heavy reliance on nonprofit organizations to operate prison nurseries, exposing the uneven, unsustainable, and often ad hoc nature of these arrangements. Rather than mitigating harm, such reforms often entrench carceral logics under the guise of care.

Ultimately, the Article calls for a shift away from reformatory models toward abolitionist frameworks that center the dignity, rights, and autonomy of both mothers and children. It urges a radical reimagining of the state’s response to maternal incarceration, one that dismantles carceral systems and enables mothers and children to live together and thrive beyond prison walls.

© 2025 Shah. This is an open access article distributed under the terms of the Creative Commons Attribution License, which permits the user to copy, distribute, and transmit the work provided that the original author(s) and source are credited.

* Doctoral Candidate, Columbia Law School. Fulbright-Nehru Research Fellow. I am deeply grateful to Smita Dharmamer, Vijay Raghavan, Kurpa Shah, Surekha Sale, Monica Dhawan, and Renu Nag for sharing their time and insights with me. I would also like to thank Julie Matonich, Olivia Hudson, Barbara Frey, and the Children of Incarcerated Caregivers team for their support throughout this project. My sincere thanks to the organizers of this symposium (particularly, Sarah Hubner and Aysha Tabassum), and to the editorial staff of the *Columbia Journal of Gender and the Law* for their thoughtful feedback and careful edits. I am equally indebted to my fellow symposium participants, whose work and reflections have enriched my thinking in meaningful ways.

INTRODUCTION

Across the world, rates of female prisoners are on the rise.¹ India ranks fourth globally in terms of its absolute prison population,² with women constituting 4.15% of the prison population in India.³ Reports from various governmental agencies, jail⁴ reform committees, and non-governmental organizations (NGOs) have consistently highlighted the deplorable conditions within women's prisons in India, which are marked by overcrowded cells, inadequate sanitary facilities, and a general lack of access to essential healthcare and recreational facilities.⁵ Many women also continue to be incarcerated in cells within larger male prisons, which exacerbates their vulnerability.⁶

What is conspicuously absent from socio-legal discourse on carcerality, which legal researcher Dr. Shona Minson calls an “institutional blindspot,”⁷ is an adequate examination of an invisible cohort—the children of incarcerated women, who are often confined along with their mothers up to the age of six in India.⁸ Equally overlooked is the painful separation children face upon turning six, when they are either placed with a suitable surrogate

1 PENAL REFORM INT'L & THAI. INST. OF JUST., GLOBAL PRISON TRENDS 2023 (2023), <https://cdn.penalreform.org/wp-content/uploads/2023/06/GPT-2023.pdf> [<https://perma.cc/JDD8-HTY4>].

2 *Incarceration Rates by Country 2024*, WORLD POPULATION REV., (2024), <https://worldpopulationreview.com/country-rankings/incarceration-rates-by-country> [<https://perma.cc/2N2M-GEHV>].

3 NAT'L CRIME RECORDS BUREAU, PRISON STATISTICS INDIA 45 (2022) (India), <https://www.ncrb.gov.in/uploads/nationalcrimerecordsbureau/custom/psiyearwise2022/1701613297PSI2022ason01122023.pdf> [<https://perma.cc/62ZS-38XL>].

4 In India, the term “jails” is used interchangeably with the term “prisons.” Pre-trial detainees are often incarcerated within the same carceral complexes as convicted individuals.

5 See, e.g., *Plight of Women in Indian Prisons: A Compilation of Facts and Figures by CJP*, CITIZENS FOR JUST. & PEACE (2019), <https://cjp.org.in/plight-of-women-in-indian-prisons/> [<https://perma.cc/67JZ-SB47>]; NAT'L COMM'N FOR WOMEN, A REPORT ON IMPROVING THE CONDITION OF WOMEN INMATES IN PRISONS (2018) (India), [<https://perma.cc/46X8-RBQV>]; MINISTRY OF WOMEN & CHILD DEV., WOMEN IN PRISONS (2018) (India) [<https://perma.cc/B7VR-3ZWG>]; CTR. FOR RSCH. & PLAN., REPORT ON PRISONS IN INDIA: MAPPING PRISON MANUALS AND MEASURES FOR REFORMATION AND DECONGESTION (2024) (India), [<https://perma.cc/7TU6-HPWH>].

6 See NAT'L CRIME RECS. BUREAU, *supra* note 3, at 13–14. In India, only sixteen out of thirty-six states and union territories have women's jails. *Id.* at 8.

7 See generally SHONA MINSON, MATERNAL SENTENCING AND THE RIGHTS OF THE CHILD (2020) [hereinafter MINSON, MATERNAL SENTENCING].

8 See Rachel Condry & Peter Scharff Smith, *The Sociology of Punishment and the Effects of Imprisonment on Families*, in PRISONS, PUNISHMENT, AND THE FAMILY: TOWARDS A NEW SOCIOLOGY OF PUNISHMENT? 2 (Rachel

caregiver or sent to an institution run by the Social Welfare Department. As of December 2022, 1,764 children accompanied their mothers (1,537) to India's prisons.⁹ Notably, 85.3% (1,312) of these incarcerated women were pre-trial detainees, with 1,479 children in tow, while 12.9% (198) were convicted individuals, accompanied by 230 children.¹⁰ These children are not collateral consequences¹¹ but are integrated into a carceral system that remains woefully ill-equipped to meet their specific needs, either in terms of safety, health, or development. This lack of recognition has created significant barriers to understanding who these children are and what their specific needs entail. The aim of this Article is to disrupt this invisibility and provide a critical examination of the lived experiences of children in prisons.

Furthermore, terms used to describe children of incarcerated caregivers, such as the "orphans of justice," the "Cinderella of penology," or the "forgotten victims of crime,"¹² are based on limited, often sentimentalized or overly simplistic narratives that obscure the broader implications of their circumstances. They do not adequately reflect the nuances of the children's experiences or their unique socio-legal status within the prison system. This Article therefore introduces the term "accidental carceral subjects" to describe these children, who are punished despite having committed no crime. The term acknowledges the lack of agency that these children have in their circumstances and the unintended nature of state harm. It highlights the legal and social gray area these children reside in, where they are ostensibly the beneficiaries of the state's policy that allows them to stay with their mothers yet are simultaneously treated as prisoners.¹³ This Article seeks to critically

Condry & Peter Scharff Smith eds., 2018). The question of prisoners' relatives and children did not surface properly until the latter part of the twentieth century.

9 NAT'L CRIME RECS. BUREAU, *supra* note 3, at 41.

10 *Id.*

11 See MINSON, MATERNAL SENTENCING, *supra* note 7. Minson has critiqued the use of the term "collateral consequences" to describe the impact of parental incarceration on children. *Id.* She argues that this terminology minimizes the harm these children experience, framing their suffering as a passive, indirect effect rather than as an intentional and direct consequence of their mothers' imprisonment by the state. *Id.* Minson highlights that the problematic origin of the phrase was in military discourse, where it was used to categorize certain people as unwanted, surplus, or expendable. *Id.*

12 See Asha Bhandari, *Women Prisoners and their Dependent Children: A Study of Jaipur and Jodhpur Central Jails in Rajasthan*, 65 SOCIO. BULL. 357 (2016).

13 See *infra*, Parts II, III.

explore this tension, highlighting the ways in which the state's actions both safeguard and undermine the welfare of children caught in the carceral web.¹⁴

The Article also critiques the illusion of choice that the state offers mothers—to either raise their children within the confines of a prison or face the heartbreaking decision of separation, condemning their child to grow up without them. This Hobson's choice reflects broader systemic failures in both the prison system and social welfare structures, which fail to provide adequate alternatives for mothers and children caught in the web of the criminal justice system.¹⁵

In this Article, I employ theoretical and critical methodologies to analyze this issue, supplementing these approaches with interviews with three NGOs—India Vision Foundation, Prayas, and Aangan Trust—that are involved in running prison nurseries in India. These interviews provide valuable insights into the practical realities of implementing policies designed to support mothers and children in prison while also illuminating the gaps between policy and practice.¹⁶ The Article highlights how India's prison system fails to meet its national and international obligations related to the rights of children and the treatment of incarcerated mothers. This leads to significant harm that disproportionately affects women and children from marginalized Dalit¹⁷ and Adivasi¹⁸ communities by failing to recognize their status as active victims of the punitive system, reinforcing their marginalization.¹⁹ According to the latest official prison statistics, 66% of undertrials belong to Scheduled Castes, Scheduled Tribes, and Other Backward Classes across religions.²⁰

14 See *infra*, Parts II, III.

15 See JOHN STUART MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT (1861). The idiom “Hobson's choice” refers to an illusion of choice between two inequivalent options.

16 See *infra* Part II.

17 The term “Dalit” refers to individuals of heterogenous communities that occupy the lowest rung of India's caste-based hierarchy and are placed outside the caste system altogether. Dalit Panthers adopted the term “Dalit” to refer to themselves, rejecting both M.K. Gandhi's label “Harijan” (which translates to “people of God”) and the British government's label of “Depressed Classes.” The term “Dalit” means “broken to pieces” in Marathi.

18 The term “Adivasis” is a Sanskrit term used to refer to India's indigenous populations.

19 See NAT'L DALIT MOVEMENT FOR JUST., CRIMINAL JUSTICE IN THE SHADOW OF CASTE: STUDY ON DISCRIMINATION AGAINST DALIT AND ADIVASI PRISONERS & VICTIMS OF POLICE EXCESSES 13–20 (2018) (India), https://www.annihilatecaste.in/uploads/downloads/data_190118030229_21000.pdf [https://perma.cc/UTE9-GJDQ].

20 Shibra Siddiqui, *Majority of Prison Undertrials Youth, From Oppressed Communities*, NEWSCLICK (Jan. 9, 2024), <https://www.newsclick.in/majority-prison-undertrials-youth-oppressed-communities> [https://

This Article proceeds in three sections. Part I introduces the broader context of the issue, tracing the socio-legal emergence of the neglect of children who accompany their mothers to colonial times. Part II assesses the gap between policy and practice regarding children in prison and further explores the inadequacy of a reform that the Indian carceral system has adopted to address the issues experienced by these accidental carceral subjects: prison nurseries. Part III offers a way forward and proposes what can be done differently. I argue that even if these policies were implemented effectively, prisons remain fundamentally unsuitable environments for children. This Part supports the recommendation of the Council of Europe that children living in prison with a primary caregiver experience substantial trauma, vulnerability, and stigmatization and that although prisons are not appropriate environments for children, forced separation of mothers and infants is highly undesirable. It therefore advocates for the adoption of the United Nations (U.N.) Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (the “Bangkok Rules”),²¹ which urge nations to employ non-custodial sentences for mothers with caregiving responsibilities.²²

Most studies on the consequences of parental incarceration suggest that the impact on children is largely consistent, regardless of the nature of the parent’s crime—whether violent or non-violent, as long as it does not involve a crime against children.²³ Accordingly, this Article adopts a non-discriminatory stance, viewing all incarcerated mothers, irrespective of the crime of which they have been charged, as deserving of support, care, and the opportunity to parent their children in a non-carceral environment.²⁴

perma.cc/JT2P-B2LY]. “Scheduled Castes” and “Scheduled Tribes” refers to a prescribed schedule of castes and tribes, including Dalits and Adivasis, in the Indian Constitution who are eligible for special provisions, including affirmative action policies under Part XVI of the Indian Constitution. India Const. art. 16(4).

21 See G.A. Res. 65/229, United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the “Bangkok Rules”) (Dec. 21, 2010).

22 *Id.* at r. 60.

23 See, e.g., SARA WAKEFIELD & CHRISTOPHER WILDEMAN, NAT’L COUNCIL ON FAM. RELS. HOW PARENTAL INCARCERATION HARMS CHILDREN AND WHAT TO DO ABOUT IT (2018) [<https://perma.cc/8G9B-8HT5>] (“One thing that is clear from the research we review here is that there is little evidence that the consequences of parental incarceration for children differ for parents convicted of violent crimes, drug crimes, or other nonviolent crimes.”).

24 The Article critiques the application of colonial legal frameworks to assess the actions of indigenous women, arguing against the characterization of certain behaviors as “crimes” under such laws. It also challenges the use of these frameworks to determine the suitability of mothers to care for their children.

While the primary focus of this Article is on children who are incarcerated with their mothers, its findings may have broader implications for children separated from their mothers and who exist on the “outside.”²⁵ The extension of punitive measures to the children of incarcerated women raises a critical ethical and legal question: How can the imposition of punishment on a primary caregiver be justified when it extends to the child, who is often an innocent party?

I. Setting the Context: Invisibility of The Accidental Carceral Subjects

A. Continuation of a Colonial Project

Colonial governance in India was consolidated through the establishment of the modern penal infrastructure.²⁶ The architecture, regulations, and conditions of colonial prisons were designed primarily with male prisoners in mind.²⁷ Women prisoners, who were a minority and therefore overlooked, were often placed in sections of prisons designed for men, with little to no regard for their gender-specific requirements, such as privacy, safety, or appropriate health care.²⁸

Furthermore, when women were incarcerated, they were often left with no choice but to bring their children along with them, particularly if there was no one to care for their children on the outside.²⁹ From the very inception of the modern prison in India, children of incarcerated mothers were subjected to the same brutal conditions as their mothers,

25 See Neelam Sukhrmani & Shivangi Gupta, *Children of Incarcerated Parents*, 57 INDIAN PEDIATRICS 199, 199–203 (2020). While there is no official data on the number of children on the outside who are affected by maternal incarceration, based on the fertility rate and the prison population within the reproductive age group, some estimates suggest that eight lakh children in India do not follow their mothers into the prison. *Id.* Therefore, the Indian carceral system impacts more children of women prisoners than women prisoners themselves.

26 See Mira Rai Waits, *Imperial Vision, Colonial Prisons: British Jails in Bengal, 1823–73*, 77 J. SOC’Y ARCHITECTURAL HISTORIANS 146, 147 (2018).

27 See Mahuya Bandopadhyay & Rimple Mehta, *Introduction: Carceral Logics, Gender Justice, and Resistance*, in WOMEN, INCARCERATED: NARRATIVES FROM INDIA 9 (Mahuya Bandopadhyay & Rimple Mehta eds., 2022) (“The prison is organized with the male prisoner as the archetype.”).

28 See Satadru Sen, *The Female Jails of Colonial India*, 39 INDIAN ECON. & SOC. HIST. REV. 417 (2002).

29 See, e.g., as recorded in Section 1(2) of the Andaman and Nicobar Manual, which detailed, amongst other things, the transportation of convicts to the islands where the British had set up a penal settlement:

including surveillance,³⁰ overcrowding,³¹ and poor hygiene.³² They were highly vulnerable to a range of health risks, exacerbated by inadequate medical care, poor sanitation, and the lack of protective measures against contagious diseases.³³ The absence of quarantine protocols for incarcerated individuals suffering from infectious illnesses led to alarmingly high mortality rates among children. For instance, in 1870, twenty-five out of thirty-seven children residing in the Female Penitentiary died within the year, a testament to the harsh and neglectful conditions in which they were confined.³⁴

There were also no specialized facilities designed to meet the needs of children, nor any efforts to create a nurturing environment conducive to their development.³⁵ Prison authorities therefore encouraged incarcerated mothers to send their children outside prison once they turned two years old.³⁶ However, many mothers resisted this mandate, fearing that such separation may negatively impact their relationships with their children.³⁷

The colonial shaping of India's carceral system did not end with the departure of the British. Instead, coloniality entrenched itself within ostensibly benign carceral reforms, such as the establishment of prison nurseries, allowing the colonial project to survive in neo-colonial forms. Implicit in these reforms is the assumption that mothers will continue to be incarcerated alongside their children—a notion embedded in the colonial logic of control and containment. In this sense, prison nurseries are not just remnants of the past but

Convict mothers are permitted to take with them to Port Blair, their children in arms who are under two years of age, in cases in which the father of the children will not keep them and no other satisfactory arrangement can be made for their being kept back in India.

ANDAMAN & NICOBAR POLICE MANUAL (1908) (India). This was possibly the first time a legal document in India had explicitly mentioned what was to be done with children who are taken to prisons by their incarcerated mothers.

30 See Waits, *supra* note 26, at 153.

31 See, e.g., Sen, *supra* note 28, at 435 (noting that eleven women were incarcerated in a space meant for four in Karnal jail).

32 See *id.* at 434.

33 See *id.*

34 *Id.* at 435.

35 See *id.*

36 See *id.*

37 See *id.*

contemporary structures that obscure broader, indigenous visions of justice and care. As Ugandan academic Mahmood Mamdani has argued, the dual and oppositional structures of colonial governance and colonial legal systems laid the groundwork for postcolonial failure even in India.³⁸ The persistence of colonial legacies in the prison system illustrates how colonial frameworks continue to shape not only the nature of punishment but also the way society imagines care, motherhood, and justice.

This Article contends that true decolonization cannot be achieved by merely reforming colonial structures. Decolonizing institutions would require us to move beyond the confines of the carceral system and rethink how we approach care and justice for incarcerated mothers and their children.³⁹ This shift is essential not only for dismantling the colonial legacies embedded in India's prison system but also for building a justice system that is truly transformative, restorative, and human centered.

B. Legal Framework Addressing Accidental Carceral Subjects

After India gained independence from the British in 1947, most Indian states allowed children to live with their incarcerated mothers. Age limits for this arrangement varied across regions—sometimes they were stated explicitly in policy, while in other cases they were left vague.⁴⁰ During this period, the union government issued a series of directives and commissioned committee reports that acknowledged the adverse conditions faced by children living in prisons.⁴¹ However, these efforts fell short of producing comprehensive policies or meaningful reforms to address the needs and welfare of these children effectively.⁴²

38 See Mahmood MAMDANI, *CITIZEN AND SUBJECT: CONTEMPORARY AFRICA AND THE LEGACY OF LATE COLONIALISM* 285 (1996).

39 See Aya Gruber, *Colonial Carceral Feminism*, in *THE ROUTLEDGE INTERNATIONAL HANDBOOK ON DECOLONIZING JUSTICE* 235 (Chris Cunneen et al. eds., 2023).

40 Some of the state-specific policies that had been explicitly codified pre-2006 have been mentioned in the *R.D. Upadhyay* judgment. See *infra* note 54.

41 See, e.g., 1 MINISTRY OF HOME AFFS., *ALL-INDIA COMMITTEE ON JAIL REFORMS (MULLA COMMITTEE)* ch. XIII (1983) (India) [<https://perma.cc/2TZ4-77TS>].

42 For instance, the 1986–87 National Expert Committee on Women Prisoners was the first exclusive official inquiry into the experiences of women and their children in correctional systems. The Committee ascertained that none of the facilities were useful for the balanced growth of children. Prior to that, in 1974, a National Policy for Children adopted by the government emphasized the importance of providing adequate services to children, especially children belonging to weaker sections of society, to ensure they reach their

A significant step forward came in 1991, when Prayas, a field-action project of the Mumbai-based Tata Institute of Social Science, launched India's first "*Balwadi*"⁴³ program in the women's section of the Arthur Road Prison in Mumbai.⁴⁴ This pioneering initiative aimed to provide a structured, pre-nursery education and developmental support to children up to the age of five years who resided with their mothers in prison.⁴⁵ Prayas appointed a teacher to oversee the *Balwadi* and to engage children in activities such as storytelling through puppets and songs, painting, and dance.⁴⁶ Additionally, volunteers visited once a week to facilitate group discussions with the children on topics including parent-child relationships, sibling rivalries, friendship, sexuality, and even crime.⁴⁷

The success of this initiative led to its incorporation in the Maharashtra state government's Integrated Child Development Scheme ("ICDS"), and the establishment of *Balwadis* in seven state prisons.⁴⁸ However, such facilities remained limited to a few locations within and outside the state of Maharashtra.⁴⁹ The availability and continuity of these daycare centers were largely contingent on the discretion of state authorities, strong-willed individuals, and collaborating NGOs.⁵⁰

potential and to protect them from neglect. Despite these publications, children continued to stay in prisons in unaltered conditions. See Tabish Ahsan, CHILDREN OF WOMEN PRISONERS: THE INVISIBLE TRIAL (Vijay Raghavan ed., 2018), [<https://perma.cc/GA3A-UHBR>].

43 *Balwadi* is a Marathi term for preschools. A Prayas report defines it as "a rural pre-primary school run economically but scientifically and using as many educational aids as possible, prepared from locally available material." AHSAN, *supra* note 44, at 11.

44 See TATA INST. OF SOC. SCIS., PRAYAS ANNUAL REPORT FEBRUARY 1991–FEBRUARY 1992 13 (1992), [<https://perma.cc/KF9M-A7V3>].

45 See MINISTRY OF HOME AFFS. & MINISTRY OF HUM. RES. COMM. ON EMPOWERMENT OF WOMEN, WOMEN IN DETENTION (2001) (India), [<https://perma.cc/CY4J-K9ZA>].

46 See TATA INST. OF SOC. SCIS., *supra* note 44, at 11.

47 See *id.*

48 See Interview with Dr. Vijay Raghavan, Professor, School of Social Work, Tata Institute of Social Science, Krupa Shah, Senior Social Worker, Prayas, & Surekha Sale, Senior Social Worker, Prayas (Oct. 5, 2023).

49 See Interview with Dr. Vijay Raghavan, Krupa Shah, & Surekha Sale, *supra* note 48.

50 See Interview with Dr. Vijay Raghavan, Krupa Shah, & Surekha Sale, *supra* note 48.

A notable example is the setting up of the first crèche⁵¹ at the Tihar Jail Complex, the largest prison in India, located in the national capital, Delhi. Between 1993 and 1995, around forty-six children were living with their mothers in the women's ward of Tihar, but there was no child specialist, no established immunization program for these children, nor any crèche facilities.⁵² Dr. Kiran Bedi, the first woman to serve in the Indian Police Service, took it upon herself to address this gap by establishing standards for the well-being of children and a crèche at Tihar, marking a pivotal moment in the lives of those children and the ones that came after.⁵³

It was only in 2006 that the Indian Supreme Court addressed the legal ambiguities surrounding children of incarcerated mothers in its ruling in *R.D. Upadhyay v. State of A.P.*⁵⁴ The court held that “female prisoners shall be allowed to keep their children with them in jail till they attain the age of six years.”⁵⁵ At the outset of the judgment, the court acknowledged the unfortunate reality faced by these children, stating:

Children, for none of their fault, but per force, have to stay in jail with their mothers. In some cases, it may be because of the tender age of the child, while in other cases, it may be because there is no one at home to look after them or to take care of them in the absence of the mother.⁵⁶

Therefore, while the judgment proceeds to frame the allowance of children below the age of six years in prisons as a choice available to mothers, for many women from marginalized communities, bringing their children to prison is often not a matter of choice but a necessity resulting from the lack of an alternative support system.

51 “A Crèche is a care centre that provides a safe and nurturing environment for children while their parents or guardians are at work.” MINISTRY OF WOMEN & CHILD DEV., NATIONAL MINIMUM STANDARDS AND PROTOCOLS FOR CRÈCHES 7 (2024) (India), [<https://perma.cc/42RQ-BBKN>]. “These facilities prioritise the children’s health, provide supplementary nutritious meals, and maintain a secure and safe environment. It provides age-appropriate educational activities to boost holistic development of the child.” *Id.*

52 See KIRAN BEDI, IT’S ALWAYS POSSIBLE: TRANSFORMING ONE OF THE LARGEST PRISONS IN THE WORLD 39 (1998).

53 Dr. Bedi won a Ramon Magsaysay Award for her work in reforming Tihar Jail. See *About Us*, INDIA VISION FOUND., <https://indiavisionfoundation.org/about-us/> [<https://perma.cc/M57G-ZKQ3>]. Bedi used the money she received from the award to set up the India Vision Foundation in 1994. See *id.*

54 *R.D. Upadhyay v. State of A.P. & Ors*, (2006) 3 SCR 1132 (India).

55 *Id.* at 1133.

56 *Id.* at 1137.

Furthermore, the court specified that, for “education and recreation” purposes, “[c]hildren below three years shall be allowed [in a] crèche and those between three and six years shall be looked after in the nursery.”⁵⁷ In its ruling, the court recommended: “The prison authorities shall preferably run the said crèche and nursery outside the prison premises.”⁵⁸ However, the judgment did not elaborate on the standards or conditions necessary for the operation of these facilities,⁵⁹ leaving many practical and logistical questions unanswered.

Importantly, the ruling emphasized that children residing with their incarcerated mothers should not be regarded as “undertrials”⁶⁰ or “convicts,”⁶¹ and that each child is entitled to basic rights, including access to adequate food, shelter, medical care, clothing, education, and recreational facilities.⁶² In furtherance of these rights, the Court issued a set of guidelines aimed at safeguarding the well-being and development of children living in prisons.⁶³ Among these guidelines was the mandate that upon reaching the age of six, a child should be placed with a suitable surrogate caregiver chosen by the mother, or, if no alternative caregiver is available, be sent to an appropriate institution operated by the Social Welfare Department.⁶⁴ The judgment, however, fell short in outlining measures to ensure that this transition is handled in a smooth or humane manner.

The *R.D. Upadhyay* judgment represents an important step in aligning Indian policy with international standards regarding children accompanying incarcerated mothers. These include the Bangkok Rules, the U.N. Minimum Standards for the Treatment of Prisoners (the Nelson Mandela Rules),⁶⁵ and the U.N. Convention on the Rights of

57 *Id.* at 1135.

58 *Id.* at 1135.

59 *See id.*

60 Pre-trial detainees are known as “undertrials” in India.

61 This holding aligns with Rule 49 of the Bangkok Rules, which states that “children in prison with their mothers shall never be treated as prisoners.” G.A. Res. 65/229, *supra* note 21, at r. 49.

62 *R.D. Upadhyay*, at 1132.

63 *Id.* at 1154–59.

64 *Id.* at 1134.

65 G.A. Res. 70/175, annex, ¶ 29, U.N. Standard Minimum Rules for the Treatment of Prisoners. (the Nelson Mandela Rules) (Dec. 17, 2015).

the Child (“U.N. CRC”),⁶⁶ all of which emphasize the protection of children’s rights in prison settings. However, the judgment falls short of providing a practical roadmap for the effective implementation of these standards, and therefore the realization of the judgment’s guidelines remains inadequate. To this day, no comprehensive legislation has been enacted to fully enforce the Court’s directives.⁶⁷ In an order issued on August 2, 2018, in the case of *In Re-Inhuman Conditions in 1382 Prisons*, the Supreme Court recognized that, despite the *R.D. Upadhyay* judgment, the prison environment is hardly conducive to the well-being and health of the children.⁶⁸ It also noted the inadequate conditions of children on the outside who are impacted by maternal incarceration and whose plight remains under-discussed.⁶⁹

The *Model Prison Manual*, last revised in 2016, provides a framework for the welfare of incarcerated individuals, including the education, diet, healthcare, and recreational opportunities of children living in prisons.⁷⁰ However, under the Indian Constitution, the administration of prisons is a state responsibility, meaning state governments have the authority to adopt and adapt the *Model Prison Manual* to meet regional needs and circumstances.⁷¹ As a result, there is no uniformity in the implementation of these welfare measures across the country. As of 2022, only eighteen out of thirty-six states and union

66 G.A. Res. 44/25, at 9, U.N. Convention on the Rights of the Child (Nov. 20, 1989).

67 The Juvenile Justice (Care and Protection of Children) Act of 2015 (JJ Act) has broadened its scope to address the care and protection of children. The Juvenile Justice (Care and Protection of Children) Act, 2015 (No. 2 of 2016). Although children whose parents are incarcerated are not specifically included, the Supreme Court has given a broad reading to the scope of protection of the JJ Act. *Re: Exploitation of Children in Orphanages in the State of Tamil Nadu v. Union of India & Ors.* (2017) 7 SCC 578. This legislation, alongside other constitutional provisions, reinforces the state’s role as a backup caregiver for children, ensuring that their welfare is a priority. Despite these legal frameworks, there has been a notable lack of accountability, which has hindered the effective assessment of existing policies and measures designed to protect children in prison.

68 See SUP. CT. OF INDIA, COMPILATION OF DIRECTIVES IN RE - INHUMAN CONDITIONS IN 1382 PRISONS, W.P. (CIVIL) No. 406/2013, [<https://perma.cc/9T2Z-B45V>].

69 See *id.*

70 See MINISTRY OF HOME AFFS., MODEL PRISON MANUAL 2016, §§ 24.26–24.36 (2016) (India). The Ministry of Home Affairs had in fact prepared the *Model Prison Manual* with the objective of “ensuring uniformity in the basic principles governing prisons.” *Prison Reforms*, MINISTRY OF HOME AFFS. (India), https://www.mha.gov.in/en/divisionofmha/Women_Safety_Division/prison-reforms [<https://perma.cc/8NHW-SRWA>].

71 See India Const. sched. VII, list II, cl. 4.

territories have fully or partially implemented the *Model Prison Manual*.⁷² This uneven implementation has led to significant disparities in prison conditions, with the welfare of incarcerated individuals (particularly mothers and children) varying widely depending on the priorities, resources, and political will of their state government. Despite partial or full implementation of the *Model Prison Manual* and compliance with the *R.D. Upadhyay* judgment in some states, the conditions for children in prisons remain far from ideal, as detailed in the next section.⁷³ Part III delves into the urgent need to abolish prisons for incarcerated mothers to truly address the welfare and rights of both mothers and children.

II. Assessing the Gaps in Implementation

As noted in the previous section, the *R.D. Upadhyay* judgment and corresponding provisions of international covenants assert that the children of incarcerated mothers should not be treated as undertrials or convicts while in jail.⁷⁴ The Bangkok Rules further stipulate that the environment for these children should resemble that of a child outside prison, ensuring their rights to a nurturing, non-punitive environment.⁷⁵ They specifically prohibit the punishment of women with infants or breastfeeding mothers through close confinement or disciplinary segregation.⁷⁶ Despite these legal frameworks protecting children's rights and providing guidelines for their care, systemic apathy, lack of accountability, and limited resources continue to impede their realization.⁷⁷ The poor implementation of the Bangkok Rules also stems from a broader disregard for Dalits and Adivasis most affected by incarceration.⁷⁸

India's prison system is beset by numerous and deep-rooted challenges, including severe overcrowding, deplorable living conditions, and insufficient infrastructure.⁷⁹ These challenges are particularly acute for incarcerated mothers, who face unique obstacles in

72 See Press Release, Ministry of Home Affs., Implementation of *Model Prison Manual* (Mar. 15, 2023) (India), <https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1907161> [<https://perma.cc/R5BJ-RBTU>].

73 See *infra* Part II.

74 See *supra* Part I.

75 See G.A. Res. 65/229, *supra* note 21, at r. 51(2).

76 See *id.* r. 22.

77 See Sukhramani & Gupta, *supra* note 25, at 202.

78 See NAT'L DALIT MOVEMENT FOR JUST., *supra* note 19, at 76.

79 See generally CTR. FOR RSCH. & PLAN., *supra* note 5.

maintaining familial relationships and accessing essential resources for their own well-being and that of their children.⁸⁰ Children continue to stay in prisons with their mothers and experience incarceration in ways that closely mirror the conditions faced by adult prisoners.⁸¹

A considerable body of literature already addresses the ways in which incarcerated children are deprived of the opportunity to lead lives of dignity and receive conditions conducive to their development.⁸² This section, therefore, focuses on the failure to adequately implement a key proposal from the *R.D. Upadhyay* judgment, which advocates for the creation of specialized facilities—such as nurseries and crèches—designed to meet the needs of children born to incarcerated individuals.⁸³ Drawing on interviews I conducted with representatives from three NGOs in India—Aangan Trust, Prayas, and India Vision Foundation, that have established and operated prison nurseries, this Part examines the shortcomings in the execution of this proposal.

A. Examples of the Prison Nursery Model in India

As set out below, NGOs are making considerable efforts to ensure the effective functioning of the Prison Nursery Model and to mitigate any immediate negative impacts on children. Although the state is responsible for managing prisons, limited resources often hinder adequate investment.⁸⁴ To bridge this gap, NGOs are stepping in to complement and support the state's efforts. They are striving to provide the best possible care within the constraints of the circumstances in which they operate.

80 See NAT'L COMM'N FOR WOMEN, *supra* note 5, at 18–19.

81 See Shreehari Paliath & Preety Acharya, *Children of Women Prisoners in India Struggle to Get Proper Food and Education Despite Guidelines*, SCROLL (Oct. 9, 2020), <https://scroll.in/article/975186/in-india-children-of-women-prisoners-struggle-to-get-proper-food-and-education-despite-guidelines> [https://perma.cc/9SNB-AP3E].

82 See, e.g., TATA INST. OF SOC. SCIS., *supra* note 44; NAT'L COMM'N FOR WOMEN, A STUDY OF CONDITION OF WOMEN PRISONERS & THEIR CHILDREN IN EASTERN U.P. JAILS 46 (2011) (India), [https://perma.cc/FFL6-Y5K4]; STUTI SHAH, CHILDREN OF INCARCERATED CAREGIVERS, 2024 INDIA PRISON NURSERY REPORT (2024), [https://perma.cc/F92W-YSE8] [hereinafter SHAH, INCARCERATED CAREGIVERS]; MINISTRY OF HOME AFFS., *supra* note 41 at 193–205; *R.D. Upadhyay v. State of A.P. & Ors*, (2006) 3 SCR 1132, at 1139–54 (India) (citing reports of deficient conditions for children).

83 See Stuti Shah, *Incarcerated Women and Their Children in Indian Prisons*, 59 ECON. & POL. WKLY. 1, 1 (2024) [hereinafter Shah, *Incarcerated Women*].

84 See DEP'T-RELATED PARLIAMENTARY STANDING COMM. ON HOME AFFS., TWO-HUNDRED FORTY-FIFTH REPORT ON PRISON-CONDITIONS, INFRASTRUCTURE AND REFORMS (2023), [https://perma.cc/RAL9-JA3X].

1. Byculla Women's Jail, Mumbai

At Byculla Women's Jail ("Byculla") in Mumbai, Aangan Trust has been providing prison nursery services to children since 2023 in a program termed "Nanhe Kadam."⁸⁵ Dr. Smita Dharmamer, Aangan's Associate Director,⁸⁶ highlighted that in accordance with the *R.D. Upadhyay* judgment, they established the prison nursery outside Byculla. This decision was made to ensure that children could experience life outside the traumatic conditions of the prison, even if for a short time. Aangan employed two caretakers and teachers to care for the children and enlisted mothers from the community to volunteer on a daily basis.⁸⁷ These volunteers offered specialized activities, such as dance, art therapy, and yoga, to enrich the children's development.⁸⁸

When I spoke to her in January 2024, Dr. Dharmamer noted that Anganwadi workers had been on strike since December 2023, demanding better wages and improved working conditions.⁸⁹ While their demands were both significant and justified, the strike inadvertently left children without access to the prison nursery and crèche facilities.⁹⁰ In this challenging context, the presence of additional caretakers and teachers provided by Aangan proved critical in maintaining stability and continuity for children.

Aangan's Nanhe Kadam is implemented through an innovative model that brings together the children of prison officials and the children of incarcerated individuals in the same nursery.⁹¹ This inclusive approach helps mitigate stigma associated with children of incarcerated parents while fostering support for the nursery and crèche programs among

85 "Nanhe Kadam" is a Hindi term for "small steps."

86 Virtual interview with Dr. Smita Dharmamer, Associate Director, Aangan Trust (May 25, 2023); Interview with Dr. Smita Dharmamer, Associate Director, Aangan Trust (Jan. 4, 2024) (at Byculla prison nursery).

87 The caretakers would also go into prison to pick the children up from the mother's barrack in the morning, then drop them back at lunchtime. They would then again pick them up after lunch and drop them back at around 4:30 p.m.

88 Interview with Dr. Smita Dharmamer, Associate Director, Aangan Trust (Jan. 4, 2024).

89 *See id.* Anganwadi workers, established under the ICDS, serve as frontline providers of essential services for childcare and development. Following significant advocacy efforts, NGO Prayas successfully facilitated the inclusion of Anganwadi workers in some Maharashtra prisons through the ICDS scheme. *See TATA INST. OF SOC. SCI.*, *supra* note 44, at 13.

90 *See* Interview with Dr. Smita Dharmamer, *supra* note 88.

91 *See id.*

prison officials.⁹² It has been particularly beneficial in states where women guards who are frequently transferred from other regions and residing in employee quarters near the prisons, lack access to childcare facilities and often bring their children to work.⁹³ Aangan has pioneered the implementation of prison nurseries with this model across five women's prisons in Maharashtra and is soon looking to expand to other states.⁹⁴

2. Tihar Jail No. 6, Delhi

India Vision Foundation runs two programs for children of incarcerated caregivers. One of them focuses on early childhood care and the development of children below the age of six who are in prison with their mothers.⁹⁵ The program has adopted commendable practices, such as organizing excursions for children to zoos and museums, which allow the children to experience life outside the confines of the prison and foster a sense of normalcy.⁹⁶ The Foundation's other program supports children on the outside, including those who have been compelled to leave prison after they turn six years of age.⁹⁷ Additionally, India Vision Foundation continues to operate the Tihar Jail crèche and nursery and has introduced the "Nanhi Kiran" program, which aims to provide a standardized early childhood care and development curriculum for children residing in prisons.⁹⁸

B. Failure of the Prison Nursery Model in India

Under the *R.D. Upadhyay* judgement as well as other legal documents, a prison nursery or crèche is categorized under the broader category of "recreational" needs for

92 *See id.*

93 *See id.*

94 *See id.*

95 *See* Virtual Interview with Monica Dhawan, Director of the India Vision Foundation & Renu Nag, Head of Learning and Development of India Vision Foundation (Nov. 13, 2023); Interview with Monica Dhawan, Director of the India Vision Foundation in New Delhi, India (Dec. 7, 2023).

96 *See* Interview with Monica Dhawan (Dec. 7, 2023), *supra* note 95.

97 *See id.*

98 They have also entered into collaborations with NGOs running prison nurseries and crèches in other states in India to share the curriculum with them.

children,⁹⁹ failing to recognize the significant developmental and emotional needs that a nursery should address. Notwithstanding the guidelines provided by the Supreme Court for prison nurseries and crèches in the *R.D. Upadhyay* judgment, these establishments have been found to be available only in a few jails.¹⁰⁰ Furthermore, even where available, their quality has been dismal in terms of the availability of teachers' play material, the presence of child-centered libraries, and the teacher-student ratio.¹⁰¹ This Section provides some insight into the issues that have contributed to the failure of the prison nursery model as a successful carceral reform in India.

1. Unsustainability of the NGO Model:

In Indian prisons, the success of the prison nursery model is highly dependent on the involvement of the NGO.¹⁰² Dr. Vijay Raghavan, who co-leads Prayas, has maintained that state governments should be responsible for setting up and conducting the prison nursery since India is a welfare state.¹⁰³ Even the *R.D. Upadhyay* judgment clearly places the responsibility of ensuring the prison nursery runs efficiently on the state.¹⁰⁴ Dr. Raghavan argues that the role of NGOs should be to support governments in identifying the best prison nursery model based on their studies and expertise, as Prayas had established through the Child Guidance Clinic.¹⁰⁵ Raghavan argues that NGOs running prison nurseries will prove unsustainable in the long run, and therefore either state governments should take over, or they should provide NGOs with the resources to run them.¹⁰⁶

Contrary to the directives laid out in the *R.D. Upadhyay* judgment, these nurseries have not been consistently established across the country, and where they do exist, the establishment of such facilities is largely contingent upon the willingness of prison authorities and the availability of NGO support, leading to significant inconsistencies in

99 See NAT'L LEGAL SERVS. AUTH., A CAMPAIGN FOR ENHANCING LEGAL SERVICES TO WOMEN INMATES AND THEIR ACCOMPANYING CHILDREN IN PRISONS (India) [<https://perma.cc/97WH-C42A>].

100 See SUKHRAMANI & GUPTA, *supra* note 25, at 200.

101 See *id.*

102 See Interview with Dr. Vijay Raghavan, *supra* note 48.

103 See *id.*

104 See *R.D. Upadhyay v. State of AP & Ors*, (2006) 3 SCR 1132, at 1135 (India).

105 See Interview with Dr. Vijay Raghavan, *supra* note 48.

106 See *id.*

their availability.¹⁰⁷ These organizations are often responsible for setting up and running prison nurseries, filling critical gaps in care, and offering support that the state has failed to provide.¹⁰⁸

Furthermore, the nurseries run by the state government, most often located within the prison itself, often lack proper infrastructure and fail to provide the necessary separation from crèches.¹⁰⁹ In cities where NGOs and prison authorities do not collaborate, the conditions of prison nurseries remain dire.¹¹⁰ Most prisons lack the resources necessary to comply with the guidelines established by the *R.D. Upadhyay* judgment.¹¹¹

In addition, organizations like the India Vision Foundation, Aangan, and Prayas predominantly operate in major urban centers, where access to NGO support is relatively easier. However, challenges in supporting the children of incarcerated women extend beyond urban areas. Due to the limited number of women's prisons in India, incarcerated women, along with their children, are often placed in facilities located far from their home regions.¹¹² As a result, children are taught in the vernacular of the new area, rather than in their mother tongue, which, according to many mothers, hinders their learning and development.¹¹³ This geographical and linguistic disconnect further complicates the efforts to provide effective support for these children.¹¹⁴

107 See Sukanya Shantha, *When 'Bandi' Is Both a Game and Life: The Children of India's Women Prisoners*, WIRE (Aug. 1, 2022), <https://pulitzercenter.org/stories/when-bandi-both-game-and-life-children-indias-women-prisoners> [<https://perma.cc/HYM3-MTGN>].

108 See *infra* Part III.

109 The space allocated to each incarcerated woman is the same, regardless of whether she has one child or multiple children. See BHANDARI, *supra* note 12, at 367.

110 See Shah, *Incarcerated Women*, *supra* note 83.

111 See SUKHRAMANI & GUPTA, *supra* note 25, at 201.

112 See Kiran R. Naik, *Women in Prisons India*, 6 INT'L J. RSCH. & ANALYTICAL REVS. 178, 199 (2019).

113 See NAT'L COMM'N FOR PROT. OF CHILD RTS., EDUC. STATUS OF CHILD. OF WOMEN PRISONERS IN INDIA 18 (2021) (India).

114 See *id.*

2. India's Limited Resources for Prison Nurseries

India lacks both the financial capacity and infrastructure to establish and sustain effective prison nurseries on a scale comparable to the models implemented in resource-intensive countries.¹¹⁵ The concept of prison nurseries, particularly as seen in countries like Norway, the United Kingdom, and Finland, envisions separate mother-baby units operated by prisons, where mothers and children can remain together in an environment that provides support around the clock and does not resemble the prison.¹¹⁶ However, in India, the resources and infrastructure devoted to prisons do not support such a model.¹¹⁷ Prison nurseries in India are structured as day care centers where children visit for a few hours each day.¹¹⁸

There is a general absence of comprehensive and specialized services that are required to run such daycare programs effectively. Empirical studies across states in India have reported that prison libraries did not have any children's books and that student-teacher ratios are shockingly poor.¹¹⁹ Even if the intention exists to create such facilities, the scale and complexity of implementation across India would require significant investment in prison infrastructure, staff training, and ongoing support systems—resources that are already stretched thin in India's overcrowded and underfunded correctional facilities.¹²⁰

Furthermore, though international covenants and the *R.D. Upadhyay* judgment have prescribed that children be separated from the general incarcerated population, often this cannot be implemented due to a resource or space crunch.¹²¹ While some larger facilities may have designated areas for incarcerated mothers and children, severe overcrowding in

115 See 1 SAHANA MANJESH & SUGANDHA SHANKAR, KARNATAKA STATE LEGAL SERVS. AUTH. & COMMONWEALTH HUM. RTS. INITIATIVE, *INSIDE KARNATAKA PRISONS* (Deepan K. Sarkar & Madhurima Dhanuka eds., 2022) (India), [<https://perma.cc/ADW6-F6W2>].

116 See Marie Claire Van Hout et al., *Children Living in Prison with a Primary Caregiver: A Global Mapping of Age Restrictions and Duration of Stay*, 7 LANCET 809, 809–14 (2023).

117 See MANJESH & SHANKAR, *supra* note 115, at 27–38.

118 SHAH, *INCARCERATED CAREGIVERS*, *supra* note 82, at 9.

119 For instance, Bhandari's study in Rajasthan Central jails notes that there was only one person that taught primary-level education to children of all age groups. See BHANDARI, *supra* note 12, 368–69.

120 See Md. Imran Wahab, *Challenges Afflicting Prisons: A First-Hand Observation*, 5 INT'L J. FOR MULTIDISCIPLINARY RSCH. 1, 3 (2024).

121 See SUKHRAMANI & GUPTA, *supra* note 25, at 200.

these designated spaces continues to harm children in manifold ways, rendering the benefit of a separate space unimpactful.¹²²

3. Ignorance

A particularly troubling aspect is that many incarcerated mothers are unaware of their legal right to have their children attend prison nurseries or crèches during the day.¹²³ This lack of awareness exacerbates the barriers to accessing these services and leaves mothers without the support and children without the benefit they are entitled to under the law.¹²⁴

In Byculla, Dharmamer often assumes the responsibility of informing incarcerated mothers about these legal mandates and encourages them to send their children to prison crèches and nurseries during the day.¹²⁵ The women are skeptical about trusting someone from the state with their children, so knowing that an NGO is running the prison nursery and hearing Dharmamer's assurances makes them feel more comfortable about sending their children to the prison nursery.¹²⁶ Dharmamer in many cases also informs prison guards and officers about these specific legal mandates outlined in the *R.D. Upadhyay* judgment, particularly the requirement that children under three years of age be provided with a crèche.¹²⁷ As a result, the role of the NGO in this context extends beyond the provision of services, encompassing the critical task of implementing and educating government officials about legal obligations.

Owing to the high illiteracy in prisons,¹²⁸ women are also unable to supplement their children's learning in the prison nursery once the children come back to the barracks. On

122 *See id.*

123 *See* Interview with Dr. Smita Dharmamer, *supra* note 88.

124 *See id.*

125 *See id.*

126 *See id.*

127 *See id.*

128 *See* NAT'L CRIME RECS. BUREAU, *supra* note 3, at xiii. According to statistics from the National Crime Records Bureau, 25.6% of incarcerated individuals in India are illiterate. *Id.* While data on literacy rates is not disaggregated by gender, it is likely that illiteracy rates are higher among women in prison. This is consistent with broader societal trends. *See* Rishabh Chauhan, *Understanding the Gender Disparities in Indian Education*, INDIA TODAY (Aug. 14, 2024), <https://www.indiatoday.in/education-today/featurephilias/story/understanding-the-gender-disparities-in-indian-education-2579174-2024-08-14> [<https://perma.cc/6V6N-GH8A>].

being asked, around 43% of the women in central jails in Rajasthan reported that they were unaware of the study material provided to their children and therefore could not contribute to supporting their children's studies.¹²⁹

This Part has demonstrated how carceral reforms in India, such as prison nurseries and crèches, fall short in their implementation. The next Part argues that even if these reforms were executed flawlessly, they would still be insufficient; true justice for both children inside and outside prisons requires the abolition of incarceration for mothers.

III. The Case for Moving Away from Prisons

While it is essential to acknowledge that separating mothers from their children has devastating consequences,¹³⁰ this Part will highlight how it is equally important to recognize that raising children in a carceral environment is both morally indefensible and legally untenable. A more humane and just alternative would involve enabling mothers of minor children¹³¹ and their minor children to remain together outside of carceral spaces, facilitated through community service or other non-carceral solutions.

Children, as independent citizens of the state, irrespective of their background, are entitled to the protection and care guaranteed to them under the Indian Constitution,¹³² the *R.D. Upadhyay* judgment, and national and international legal frameworks, including the JJ Act and the U.N. CRC, respectively. The state has a clear duty of care towards them, and any departure from this responsibility must have a clear, legitimate basis rooted in law.

This section calls for the abolition of prisons,¹³³ particularly for mothers and their children, highlighting the failures of reform efforts, including the inadequacies of the

129 NAT'L COMM'N FOR PROT. OF CHILD RTS., *supra* note 113, at 20.

130 Article 9 of the U.N. CRC also obligates states to ensure that a child is not separated from their parents, unless such separation is in the best interest of the child.

131 Minor children are defined as individuals below the age of eighteen, as specified by the JJ Act.

132 For instance, the Rights Against Discrimination (Article 15) and Right to Education (Article 21A) are fundamental rights under the Indian Constitution that explicitly recognize children as recipients of rights as equal citizens of India.

133 While this Article focuses on advocating for the abolition of prisons for women and children, this does not imply that other individuals are any less deserving of prison abolition. Rather, I argue that the issue of children of incarcerated caregivers provides a particularly compelling entry point for broader discussions on prison abolition, given the urgency and moral weight of their circumstances.

current prison nursery model. It calls for interventions that center the rights, dignity, and well-being of both mothers and their children so that we can take a significant step toward reimagining justice systems more broadly that move beyond punishment and towards care and restoration.

A. Inadequacy of Reformist Efforts

Reforms seek to improve an institution by modifying it. This Section critiques reformist efforts, which attempt to change the carceral system by investing in it. I instead advocate for abolitionist reforms, which are explored in the following Section.¹³⁴

Even if the gaps in implementation of the *R.D. Upadhyay* judgment highlighted in Part II above were addressed,¹³⁵ such as through increased funding for prison infrastructure, improved conditions, and the establishment of successful prison nurseries, this section supports the stance articulated by the Council of Europe: prisons, by their very nature, are fundamentally inappropriate environments for children.¹³⁶ No amount of investment in beautifying or improving prison facilities can change the fact that prisons are unconstitutional for children, are designed primarily for punishment, and are inherently isolating, overcrowded, and restrictive.

1. Prisons as Inherently Unsuitable for Children

Studies from across the world have shown that children of incarcerated mothers often experience disrupted education¹³⁷ and difficulty in following a pro-social trajectory, resulting in increased criminality.¹³⁸ These children often encounter a higher aggregate

134 See CRITICAL RESISTANCE, REFORMIST REFORMS VS. ABOLITIONIST STEPS TO END IMPRISONMENT (2021), [<https://perma.cc/BC3Z-BVWJ>].

135 See *supra* Part II.

136 See COUNCIL OF EUR., RECOMMENDATION CM/REC (2018) 5 OF THE COMMITTEE OF MINISTERS TO MEMBER STATES CONCERNING CHILDREN WITH IMPRISONED PARENTS 22 (2018), [<https://perma.cc/Z3WT-X7DT>] (“[M]any prisons do not provide suitable facilities for children to experience meaningful contact with their imprisoned parent, and children’s best interests and needs are frequently seen as incompatible with security concerns.”).

137 See Danielle H. Dallaire & Laura C. Wilson, *The Relation of Exposure to Parental Criminal Activity, Arrest, and Sentencing to Children’s Maladjustment*, 19 J. CHILD & FAM. STUD. 404, 412 (2010).

138 See GREER LITTON FOX & MICHAEL L. BENSON, FAMILIES, CRIME AND CRIMINAL JUSTICE (2000), [<https://perma.cc/PUS7-HU2K>].

of adversities and risk factors, which can exacerbate their vulnerability.¹³⁹ A recent study from the Netherlands underscores the severity of these effects, revealing that children who experience maternal imprisonment are more likely than their peers, and even more so than children of incarcerated fathers, to die before the age of sixty-five.¹⁴⁰ Prisons are inherently unsuitable environments for children, as has been documented by several reports,¹⁴¹ regardless of how well these reforms are implemented.

a. Foundational Disregard for Children

Sociologist Megan Comfort highlights the distinct impact of the carceral system on children, arguing that unlike other institutions designed to provide a “social good,” the prison system has a corrosive impact on children.¹⁴² Minson argues that a “corrosive” form of harm inflicts a long-lasting and peculiar kind of damage that shapes a child’s identity, socialization, and sense of security.¹⁴³ This harm is distinct because it is not an isolated traumatic event but rather a pervasive, ongoing experience that fundamentally alters a child’s relationship with their primary caregiver and the world around them.¹⁴⁴

The carceral system remains predominantly adult-centered, with little attention given to how children may be affected by maternal incarceration, and fails to cater to their specific needs.¹⁴⁵ Legal scholar Julia Fionda’s theory of “conceptual malleability” provides further insight into how the law tends to conflate the interests of children with those of adults, leading to a distortion of children’s identities, legal standing, and social needs.¹⁴⁶ This perspective, Fionda argues, prevents the development of appropriate care structures

139 ALISON CUNNINGHAM & LINDA L. BAKER, *WAITING FOR MOMMY: GIVING A VOICE TO THE HIDDEN VICTIMS OF IMPRISONMENT* (2003).

140 Steve G.A. van de Weijer et al., *Parental Imprisonment and Premature Mortality in Adulthood*, 4 J. DEVELOPMENTAL & LIFE-COURSE CRIMINOLOGY 148, 148 (2018).

141 See TATA INST. OF SOC. SCIS., *supra* note 44; NAT’L COMM’N FOR WOMEN, *supra* note 5; SHAH, *INCARCERATED CAREGIVERS*, *supra* note 82; MINISTRY OF HOME AFFS., *supra* note 41 at 193–205.

142 See Megan Comfort, *Punishment Beyond the Legal Offender*, 3 ANN. REV. L. & SOC. SCI. 271, 273 (2007).

143 See Shona Minson, *Briefing Paper: The Impact of Maternal Imprisonment upon a Child’s Wellbeing and Their Relationship with Their Mother* (Nov. 8, 2017), <https://ssrn.com/abstract=3067653> [<https://perma.cc/L8AW-3JA7>] [hereinafter Minson, Briefing Paper].

144 See *id.*

145 See Julia Fionda, *Introduction to LEGAL CONCEPTS OF CHILDHOOD* 3–18 (Julia Fionda ed., 2001).

146 See *id.*

for children in the context of incarceration.¹⁴⁷ Furthermore, the legal and institutional treatment of children as a homogenous group, without consideration for their individual needs, backgrounds, or experiences, further exacerbates the challenges they face.

The U.N. CRC recognized in its 2005 General Comment on Implementing Rights in Early Childhood that children of incarcerated parents are particularly vulnerable.¹⁴⁸ Despite this recognition, the state has consistently failed to adequately address the unique rights and needs of these children within legal frameworks.¹⁴⁹ This systemic neglect results in a form of discrimination.

To better articulate the distinctive harm suffered by children of incarcerated parents, many scholars, including Minson, emphasize the concept of “secondary prisonization.”¹⁵⁰ This term, developed by Megan Comfort, describes how the wives and partners of incarcerated men experience the pervasive effects of the carceral system without being incarcerated themselves.¹⁵¹ I argue that secondary prisonization is especially potent for children on the inside, who experience firsthand the carceral system’s efforts to regulate and control their bodies, disciplining and shaping their responses to their mothers’ imprisonment. These children are often forced into a liminal existence, separated not only from their mothers but also from siblings, friends, and extended family. In this way, their experience extends far beyond the immediate loss of parental care: it reshapes their entire world.

b. Impact on Early Socialization

Incarcerated mothers face significant challenges in shielding their children from the negative influences and behaviors prevalent within the prison environment.¹⁵² These

147 See *id.*

148 Children’s rights to development are at serious risk where they are orphaned, abandoned, or deprived of family care, or where they suffer long-term disruptions to relationships or separations (e.g., due to parental imprisonment); U.N. CRC, GENERAL COMMENT NO. 7: IMPLEMENTING CHILD RIGHTS IN EARLY CHILDHOOD 9 (2005).

149 As highlighted in Parts II and III of this Article.

150 See Shona Minson, *Direct Harms and Social Consequences: An Analysis of the Impact of Maternal Imprisonment on Dependent Children in England and Wales*, 19 CRIMINOLOGY & CRIM. JUST. 519 (2019) [hereinafter Minson, *Direct Harms*].

151 See COMFORT, *supra* note 142.

152 See SUKHRAMANI & GUPTA, *supra* note 25.

influences include the widespread use of profanity, exposure to various vices, and the normalization of aggressive or coercive behaviors.¹⁵³ Children, being highly impressionable, are likely to internalize and emulate the behaviors they observe in their surroundings.¹⁵⁴ Dhawan shared an account of a child in Tihar Jail who repeatedly exhibited violent behavior by hitting other children in the prison nursery—a pattern of conduct the child appeared to have adopted from her mother.¹⁵⁵

Dharmamer mentioned that their primary aim with setting up prison nurseries in Maharashtra was to shield children from, and help them unlearn, the detrimental aspects of prison culture to which they are exposed.¹⁵⁶ To achieve this, they have instituted a mandatory afternoon nap time for children in the nursery, providing them with a brief respite from the constant noise, altercations, and the pervasive sound of television in the barracks, allowing them a period of calm and the opportunity to rest deeply.¹⁵⁷ However, given that the children spend limited time in the prison nursery and are ultimately returned to the hostile environment of the prison, the positive effects of the nursery are often undermined by their ongoing exposure to the broader prison culture.¹⁵⁸ As such, so long as the fundamental nature of the prison environment remains unaddressed, the prison nurseries are unlikely to yield substantial long-term benefits for the children.

Children living in prison experience significant social isolation and limited opportunities for healthy socialization, resulting in their worldview being shaped by the prison subculture.¹⁵⁹ In the case of *R.D. Upadhyay* (which was also noted in the interview with Raghavan),¹⁶⁰ the court highlighted how children born in prison grow up in an artificial environment, with restricted exposure to the outside world.¹⁶¹ As a result, commonplace experiences, such as encounters with non-human animals, vehicles, or even natural

153 *See id.*

154 *See id.*

155 *See* Virtual Interview with Monica Dhawan & Renu Nag (Nov. 13, 2023), *supra* note 95.

156 *See* Interview with Dr. Smita Dharmamer, *supra* note 88.

157 *See id.*

158 *See* Interview with Monica Dhawan, *supra* note 95.

159 *See* SUKHRAMANI & GUPTA, *supra* note 25.

160 *See* Interview with Dr. Vijay Raghavan, *supra* note 48.

161 *See* *R.D. Upadhyay v. State of AP & Ors*, (2006) 3 SCR 1132, at 1135–36 (India).

elements like the stars and the moon, become unfamiliar and frightening.¹⁶² Additionally, their interactions with male figures are typically limited to those in positions of authority, leading them to associate such figures with violence.¹⁶³ Consequently, these children lack the concept of a “home” as a safe, violence-free sanctuary.¹⁶⁴

This “prisonization”¹⁶⁵ of children is pronounced, especially since it impacts them during their formative years and therefore has a lasting impact on their foundational development.¹⁶⁶ The harm these children experience continues to affect them at every stage of their lives, shaping their development and future interactions with society.¹⁶⁷

c. Impact on Children’s Mental Health

Children experience significant secondhand trauma on account of their mothers, who are themselves deeply traumatized, in addition to experiencing significant trauma firsthand.¹⁶⁸ A study has reported that thirteen out of sixteen children living with their mothers in prison when surveyed were found to have moderate to severe aggression, and three had mild aggression or no aggression.¹⁶⁹ Furthermore, mothers cannot be nurturing because the carceral environment deprives them of the opportunity to develop a bond with their children, especially when they are burdened with being sole caregivers around the clock.¹⁷⁰

162 See Interview with Dr. Vijay Raghavan, *supra* note 48; see also TATA INST. OF SOC. SCIS., *supra* note 44 at 3.

163 See TATA INST. OF SOC. SCIS., *supra* note 44, at 3.

164 See *id.*

165 See Liam Martin, “Free but Still Walking the Yard”: Prisonization and the Problems of Reentry, 47 J. CONTEMP. ETHNOGRAPHY 671, 673 (2018).

166 See Minson, *Direct Harms*, *supra* note 150, at 532.

167 See *id.*

168 See SHAH, INCARCERATED CAREGIVERS, *supra* note 82.

169 Shilpi Sarkar & Sandhya Gupta, *Prevalence of Aggressive Behaviour Among Children Co-Detained with Imprisoned Mothers in a Selected Prison of North India*, 2 INT’L J. PAEDIATRICS & CHILD CARE 1, 1 (2017).

170 There is more to be written about the experiences of mothers in prisons, but since this Article focuses on the child, rather than the mother, I have not gone into the mother’s experiences with motherhood in more detail.

Children in prison are frequently exposed to forms of structural violence, whether from prison officers, other prisoners, or the routine struggle for basic necessities like food, water, and space.¹⁷¹ They are often silent witnesses to the dehumanizing treatment their mothers endure, which can include verbal abuse, physical mistreatment, neglect, and the daily stress of survival in an overcrowded and under-resourced institution.¹⁷² Prisons also amplify conditions of economic distress where the opportunity cost of an adequate meal is hygiene, and mothers are constantly put in the unfair position of making this choice.¹⁷³ Mothers have reportedly sold their child's share of legally obligated milk to other women prisoners to get money to buy toiletries.¹⁷⁴ This systemic depravity and violence creates a toxic environment that negatively impacts the psychological and emotional development of children.¹⁷⁵ Children internalize these experiences to such an extent that it informs the games they play, their thoughts, and the violence they in turn exhibit.¹⁷⁶

Children are also subjected to the same restrictive conditions as their mothers, even though they are not convicts themselves, and even if their mothers are pre-trial detainees.¹⁷⁷ For instance, the rigid “*bandi*” timings, which dictate the hours of confinement for incarcerated people in their barracks and span a majority of the day, are imposed on children as well.¹⁷⁸ Journalist Sukanya Shantha highlights the almost immediate impact of confinement during *bandi* through the instance of a boy who would start screaming

171 See SUKHRAMANI & GUPTA, *supra* note 25.

172 Shah, *Incarcerated Women*, *supra* note 83.

173 See Kiran Bedi, *Foreword* to RUZBEH NARI BHARUCHA, SHADOWS IN CAGES: MOTHER & CHILD IN INDIAN PRISONS 7, 9 (2004) (describing how mothers in a certain Indian prison sold—to other prisoners—the extra milk that their child was statutorily entitled in exchange for toiletries, highlighting the harsh survival strategies in a system of deprivation).

174 See *id.*

175 See Patricia Allard, *When the Cost Is Too Great: The Emotional and Psychological Impact on Children of Incarcerating Their Parents for Drug Offences*, 50 FAM. CT. REV. 48, 48–52 (2012).

176 See Shantha, *supra* note 107.

177 In fact, even pre-trial detainees are treated as convicts, but this would be the focus of another paper.

178 *Bandi* timings vary across prisons but are generally imposed for the majority of the day. For instance, in Byculla Women's Prison in Mumbai, women are allowed outside their barracks for only nine hours every day—from six a.m. to twelve p.m. and then again from three p.m. to six p.m. They are otherwise locked in their cells throughout the day. On Sundays and holidays, they are allowed outside their barracks only for seven hours—from six a.m. to one p.m. See Interview with Dr. Smita Dharmamer, *supra* note 88.

hysterically and was visibly traumatized every time the barracks were locked.¹⁷⁹ He even tried to squeeze his little body out of the iron bars every single day.¹⁸⁰ The overcrowded nature of these barracks further exacerbates the problem, as children during *bandi* often lack adequate space to play, explore, or interact with others in ways that would promote healthy development. The impact of this restrictive environment on children's behavior and development is profound.

Children are generally prohibited from leaving the prison premises, except under specific circumstances, further isolating them from the outside world.¹⁸¹ Typically, even family members distance themselves from justice-impacted women.¹⁸² This kind of isolation experienced by women and their children further impacts their mental health. Confinement is often accompanied by humiliating and invasive experiences, such as strip searches, which are routinely imposed on both incarcerated mothers and their children upon re-entry into prison.¹⁸³

Over time, as these children grow accustomed to the prison routine, they develop a heightened reliance on the highly controlled and rigid structures of prison life.¹⁸⁴ Once released from prison, these children often struggle with reintegration into society, as they have difficulty adapting to self-directed routines, making independent decisions, and establishing healthy relationships, much like their mothers.¹⁸⁵

Finally, the stigma attached to incarcerated mothers extends to their children, a phenomenon that sociologist Erving Goffman conceptualizes as "courtesy stigma."¹⁸⁶ Criminology professor Rachel Condry adds nuance to this transmutation of stigma by

179 See Shantha, *supra* note 107.

180 See *id.*

181 See NAT'L COMM'N FOR PROT. OF CHILD RTS., *supra* note 113, at 12.

182 See Nanumma Subba, *The 'Double Jeopardy' of Criminal Women in India: Revisiting the Literature and Jurisprudence*, 2021 I.L.I. L. REV. 26 (2021).

183 See Shantha, *supra* note 107.

184 See Martin, *supra* note 165. Though Martin discusses such challenges amongst adult prisoners, the same would be true for children staying with their incarcerated mothers, who experience life in prison as carceral subjects.

185 See *id.*

186 See ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* 43 (1963).

framing the term “secondary stigma,” explaining that it “does not simply ‘rub off’” on the child due to close proximity but also due to “causal implication.”¹⁸⁷ This stigma burdens children of incarcerated mothers with the perceived responsibility for their mother’s actions.

Condry identifies several key manifestations of such stigma, social isolation, constant anxiety about whom to trust with their past, and an inability to share their struggles.¹⁸⁸ Their difference becomes central to their identity, leading to discrimination and self-consciousness both personally and publicly.¹⁸⁹ Such discrimination not only harms them emotionally but also perpetuates disparities in social, economic, and political power, with long-lasting cultural and political consequences.¹⁹⁰

Many children, once released, report that they have no one to talk to about their mother’s imprisonment, and lacking this outlet further impacts their mental health.¹⁹¹ The grief they experience is ambiguous, uncertain, and unvalidated. What they experience cannot be “openly acknowledged, socially sanctioned, or publicly mourned.”¹⁹² This can also generate feelings of shame and embarrassment, which Minson terms as “confounding grief.”¹⁹³ This may be expressed in anger, aggression, and other forms of behavior that may result in criminalization.¹⁹⁴

Therapy and external support can equip children with tools to articulate their emotions and better understand their experiences. However, mental health counseling remains largely absent from most schools, particularly government schools, due to limited funding, lack

187 RACHEL CONDRI, *FAMILIES SHAMED: THE CONSEQUENCES OF CRIME FOR RELATIVES OF SERIOUS OFFENDERS* 62 (2007) (“I will use the term secondary stigma because it is both a stigma by contagion—an extension of the offender’s stigma travelling through kinship ties—and a stigma attached to the new identity the relative holds as a ‘mother of a murderer’ or ‘wife of a sex offender’ and the blame this new status attracts.”).

188 *See id.* at 82–88.

189 Rachel Condry & Shona Minson, *Conceptualising the Effects of Imprisonment on Families: Collateral Consequences*, *THEORETICAL CRIMINOLOGY* 540, 542–43 (2020).

190 *See id.*

191 *See* Minson, *Direct Harms*, *supra* note 150.

192 *See id.*

193 *See id.*

194 *See id.* at 524.

of trained professionals, and the persistent stigma surrounding mental health care.¹⁹⁵ As a result, many children of incarcerated parents are left without the necessary resources to process their grief and trauma even once they return to school, exacerbating their emotional distress and increasing their vulnerability to systemic neglect.

The adversities children of incarcerated mothers face affect them differently depending on factors such as their personal resilience, age, and specific circumstances, as well as the availability of external support and alternative care options.¹⁹⁶ However, the systemic and structural issues outlined above have manifestations on all children of incarcerated mothers to a certain degree.

2. Constitutionality of Children in Prisons and the Best Interest Principle

The Bangkok Rules state that the decision to allow children to stay with their mothers in prison should be based on the child's best interests.¹⁹⁷ However, the Bangkok Rules do not provide any clear criteria for determining what constitutes the "best interests" of the child. The U.N. CRC emphasizes that children's perspectives in the determination of their best interests need to be taken into consideration in accordance with their age and maturity.¹⁹⁸

While the *R.D. Upadhyay* judgment subscribes to the best interests of the child principle,¹⁹⁹ it lacks nuance by granting mothers the complete autonomy to decide whether to bring their children with them to prison without any expert evaluation of the child's best interests and without taking into consideration the child's voice. Unlike resource-intensive countries, the Indian legal system does not have the resources or bandwidth to devote to such an independent determination of the "best interest of the child." While many mothers may genuinely consider their child's best interests, some may lack the foresight to make that decision, and others may be incapable of fulfilling their role as a nurturing, protective parent given their circumstances. Some mothers are also unaware of their rights to keep their children outside the prison, and in some cases, they are deeply distrustful of state

195 See Baiarbha Massar, *School Based Mental Health Programme in India: A Review*, 11 INT'L J. INDIAN PSYCH. 3002, 3008–10 (2023).

196 See NEELAM SUKHRAMANI ET AL., CHILDREN OF INCARCERATED PARENTS: EXPERIENCES AND IMPACTS (2019).

197 See G.A. Res. 65/229, *supra* note 21, at r. 69.

198 See G.A. Res. 44/25, *supra* note 66, at art. 12.

199 See *R.D. Upadhyay v. State of AP & Ors*, (2006) 3 SCR 1132, at 1138 (India).

authorities,²⁰⁰ fearing that their children would be institutionalized if left in the outside world. The lack of oversight raises serious concerns about the adequacy of the decision-making process in protecting vulnerable children. The *R.D. Upadhyay* judgment fails to acknowledge that the mother may not always be able to make decisions in the child's best interest or that the best interests of the child may conflict with the mother's own needs and circumstances.

Furthermore, the judgment grants mothers the choice to bring their children to prison without recognizing that this choice is largely illusory.²⁰¹ Existing policies have legitimized the assumption that prison is the default placement for children who lack alternative support systems. For instance, the *Model Prison Manual* of 2016 states, "A child up to six years of age shall be admitted to prison with his mother if no other arrangements, for keeping him with relatives or otherwise, can be made."²⁰² This provision creates an inherent inequality within the law, disproportionately affecting children from marginalized communities who lack access to alternative caregivers. Such children are effectively compelled to live in prison until the age of six, without a critical assessment of whether this arrangement truly serves their best interests. As a result, children from these communities are unduly subjected to the hostile and harmful environment of prison—a reality not faced by children of mothers with greater resources or options.

The situation of children with incarcerated parents raises significant concerns regarding discrimination, as it contravenes the protections afforded under Articles 14 and 15 of the Indian Constitution, as well as Article 2 of the U.N. CRC.²⁰³ The Indian Constitution guarantees fundamental rights and directive principles of state policy that

200 See Shantha, *supra* note 107.

201 See *id.*

202 MINISTRY OF HOME AFFS., MODEL PRISON MANUAL 2016, 244 (2016) (India).

203 Article 14 of the Indian Constitution guarantees that "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India." India Const. art. 14. Article 15, clause 1 of the Indian Constitution states, "The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them." India Const. art. 15 cl. 1. Article 15, clause 3 of the Indian Constitution clearly demarcates women and children as special categories of citizens who owing to the historic negligence they have suffered, would be subject to special provisions for their welfare. India Const. art. 15 cl. 3. It states, "Nothing in this article shall prevent the State from making any special provision for women and children." *Id.* Article 2 of the U.N. CRC aims to protect children from discrimination which they may suffer as a consequence of the "status" or "activities" of their parents. G.A. Res. 44/25, *supra* note 66, at art. 2.

are meant to safeguard children's interests.²⁰⁴ These include the right to live in freedom and dignity,²⁰⁵ the right to health,²⁰⁶ opportunities for healthy development,²⁰⁷ and access to early childhood care and education, particularly for those under six years of age.²⁰⁸ Thus, the Constitution recognizes children as independent rights-holders. However, the treatment of children of incarcerated mothers flagrantly violates these constitutional protections and their rights under the U.N. CRC. This situation results in what Kolber terms the "unintentional burden of punishment," whereby children, through no fault of their own, bear the negative consequences of their parents' incarceration.²⁰⁹ Incarcerating children alongside their mothers is therefore fundamentally unconstitutional.

American legal academic James Dwyer is a vocal critic of prison nurseries, arguing that they are unconstitutional and that states are placing children in these environments without due process, thereby violating the children's constitutional rights at taxpayer expense.²¹⁰ His argument is based on the premise that women in prison are ill-suited to be long-term parents, and therefore their children may be better off being placed for adoption, or if the mother's sentence is under seven months, placed with a temporary caregiver until her release.²¹¹ This Article does not support Dwyer's view of imprisoned mothers as inherently unfit parents. Instead, it argues that neither mothers of minor children nor their minor children should be in prison in the first place and that placing children in prisons is an incursion on their constitutional rights.

204 Parts 3 and 4 of the Indian Constitution contain the Fundamental Rights guaranteed to the citizens of India and the Directive Principles of State Policy, respectively. *See* India Const. arts. 12–51.

205 Article 19(1)(d) states that all citizens shall have the right to "move freely throughout the territory of India." India Const. art. 19, cl. 1(d). Article 21 states, "No person shall be deprived of his life or personal liberty except according to procedure established by law." India Const. art. 21.

206 *See* Mridula Sarmah, *A Study of Right to Health Under the Constitution of India*, 5 INT'L J. HUMANS. & SOC. SCI. STUD. 85, 85–90 (2019).

207 Article 39(f) of the Indian Constitution requires "that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment." India Const. art. 39(f).

208 Article 45 of the Indian Constitution states, "The State shall endeavour to provide early childhood care and education for all children until they complete the age of six years." India Const. art. 45.

209 Adam J. Kolber, *Unintentional Punishment*, 18 LEGAL THEORY 1, 13 (2012).

210 *See* James G. Dwyer, *A Constitutional Birthright: The State, Parentage, and the Rights of Newborn Persons*, 56 UCLA L. REV. 755, 835 (2009).

211 *See id.* at 770.

It is deeply contradictory that colonial-era legislation, such as the Prisons Act of 1894,²¹² continues to govern the experiences of women and children in Indian prisons—legislation that was enacted long before the Indian Constitution came into effect in 1950. These laws make no provision for the children of incarcerated mothers, reflecting a failure to incorporate constitutional principles into the correctional system. This Article argues that, if subjected to contemporary constitutional scrutiny, legislation allowing children to stay with incarcerated parents could be deemed unconstitutional, as they are discriminatory, arbitrary, and in violation of their fundamental rights. It is crucial to address these systemic flaws and the enduring legacies of colonial policies in order to create a decolonial, compassionate, and just correctional framework.

B. Need for Prison Abolitionist Interventions

As discussed in Part I, the correctional facilities established during British colonial rule in India were not designed with children in mind.²¹³ Given this, it is both impractical and unjust to try to integrate children into a system that was not designed to meet their needs. Incarcerated mothers of minor children should not be compelled to make the impossible choice between leaving their children behind or subjecting them to the harmful and dehumanizing conditions of prison. Continuing to fund prisons (including reforms such as prison nurseries) ultimately contradicts the broader vision of prison abolition, which seeks both to dismantle the system of imprisonment and to create sustainable, community-centered alternatives.²¹⁴ Since abolition is a long-term, radically transformative process, immediate interventions are also necessary, ones that do not further entrench or expand the carceral system. Non-reformist or abolitionist reforms serve as intermediate measures, introducing changes within the carceral system that align with abolitionist principles of making sustainable and material differences in people's lives without requiring additional investment in it.²¹⁵ I have set out below some non-reformist reforms and abolitionist ideas that can help us inch towards this objective.

212 Prisons Act, 1894 (India).

213 See *supra* Part I.A.

214 See *What Is the PIC?, What is Abolition?*, CRITICAL RESISTANCE, <https://criticalresistance.org/mission-vision/not-so-common-language/> [<https://perma.cc/SU4U-2ZQC>].

215 See CRITICAL RESISTANCE, *supra* note 134; ANGELA DAVIS ET AL., *ABOLITION. FEMINISM. NOW.* (2022).

1. Liberalizing Bail Provisions

As discussed in the Introduction, more than 85% of women who are in prison with their children are pre-trial detainees.²¹⁶ A majority of these mothers belong to marginalized communities and are detained for a prolonged period of time before their trial due to reasons associated with their lack of social capital and resources.²¹⁷ Legally, they are innocent, as the accusations against them have not been proven.

For the children of pre-trial detainees, life inside is characterized by instability and upheaval. They may form attachments to certain peers or caregivers within the institution, only to face the uncertainty of being transferred to other facilities or external placements, often only to be returned later. This constant disruption harms their emotional and psychological well-being.

While the law does not currently recognize the unique vulnerabilities of pre-trial mothers and their children, a few judicial decisions have granted temporary bail to mothers on postpartum and caregiving grounds. Notably, the Punjab and Haryana High Court in *Naina v. State of Punjab*,²¹⁸ and the Additional Sessions Judge in Delhi in *State v. Suman Kumari*,²¹⁹ granted bail to new mothers for limited durations, acknowledging the adverse effects of incarceration on the mental and physical health of their children, the stigma they face, and the long-term implications for their cognitive and emotional well-being. However, such outcomes depend heavily on the individual discretion of judges and are far from being institutionalized practice.

To address this, bail provisions for pre-trial detainees who are mothers of minor children must be made more flexible and accessible through policy change. A comparative example can be drawn from Italy, where the law categorically excludes pre-trial detention for parents of children under six years of age, eliminating judicial discretion in such cases.²²⁰

216 NAT'L CRIME RECS. BUREAU, *supra* note 3, at xiii.

217 See Vrinda Bhandari, *Pretrial Detention in India: An Examination of the Causes and Possible Solutions*, 11 ASIAN J. CRIMINOLOGY 83, 98–99 (2016).

218 See *Naina v. State of Punjab*, Crm-M-16103/2024, Punjab & Haryana High Court (May 13, 2024).

219 See *State v. Suman Kumari*, Bail Matter No. 1132/21, Additional Sessions Judge, Delhi (March 31, 2021).

220 See AGNIESZKA MARTYNOWICZ, DANISH INST. FOR HUM. RTS., CHILDREN OF IMPRISONED PARENTS 14 (2019), [<https://perma.cc/Q8NG-HWXQ>].

Adopting similar legislative safeguards in India would represent an important step toward truly centering the best interests of the child in pre-trial detention decisions.

2. Amendment of Sentencing Guidelines

The criminal legal system, from the stage of defining what a crime is to sentencing an individual for the crime, operates within a patriarchal lens.²²¹ There is a growing need to advocate for sentencing guidelines that consider the presence of children and prioritize alternatives to incarceration for mothers to avoid the harm inherent in incarceration. Rules 57 and 61 of the Bangkok Rules encourage states to adopt such gender-mainstreamed sentencing guidelines.²²² However, domestic law has yet to build these recognitions in.

Most notably, South Africa altered its sentencing practices to give regard to the children of defendants.²²³ The case of *M v. the State* before the Constitutional Court of South Africa held that criminal courts must not relinquish the welfare interests of the state and ordered them to develop sentencing guidelines that consider the unique experiences of mothers and the children who accompany them to prison.²²⁴ It further stated that “statutes must be interpreted, and the common law developed in a manner which favors protecting and advancing the interests of children.”²²⁵ It also referred to the state’s duty to minimize harms suffered by children when their parents are unable to care for them properly.²²⁶ The judgment provides a helpful blueprint for other countries to recognize their duty of care towards all citizens and that children, too, constitute citizenry of the State.²²⁷

221 See DIKSHA PANDEY, SOC. & POL. RSCH. FOUND., FEMALE PRISONERS IN INDIA: THE CONSEQUENCES OF TRIPLE MARGINALISATION (2021), [<https://perma.cc/3JQX-S7DX>].

222 See G.A. Res. 65/229, *supra* note 21, at Part III.

223 See *M v. the State*, 2007 (3) SA 232 (CC) (S. Afr.).

224 *Id.* Having said this, I acknowledge that Professor Mrinal Satish is skeptical of the impact of sentencing guidelines, especially in cases of rape. See MRINAL SATISH, DISCRETION, DISCRIMINATION AND THE RULE OF LAW: REFORMING RAPE SENTENCING IN INDIA (2016).

225 *M v. the State*, 2007 (3) SA 232 (CC) at ¶ 15 (S. Afr.).

226 See *M v. the State*, 2007 (3) SA 232 (CC) at ¶¶ 20, 35 (S. Afr.).

227 “If a child is to be constitutionally imagined as an individual with a distinctive personality, and not merely as a miniature adult waiting to reach full size, he or she cannot be treated as a mere extension of his or her parents.” *M v. the State*, 2007 (3) SA 232 (CC) at ¶ 18 (S. Afr.).

While sentencing mothers of minor children, Indian courts have typically not considered the rights of a dependent child.²²⁸ Judges interviewed by Prayas for a study indicated that they did not feel that the law had assigned the adult courts a definite role and responsibility for the children of prisoners.²²⁹ However, even an amendment to the sentencing guidelines may have limited application when judges exhibit severe bias about prisoners and their backgrounds. Prayas' report recorded a judge commenting that children were suffering the consequences of their mothers' actions.²³⁰

3. Decarcerating Children and Their Mothers

From the moment of arrest through to imprisonment, the criminal justice system is deeply traumatic for both the mother and child.²³¹ Although Rule 29(2) of the Nelson Mandela Rules states that "Children in prison with a parent shall never be treated as prisoners,"²³² this principle remains aspirational in the Indian context, where children are treated as carceral subjects. The emotional and psychological toll of separation, the uncertainty surrounding their future, and the abrupt disruption to their lives are rarely discussed in policy circles or legal discourse.²³³

The court in *R.D. Upadhyay* noted that a child living in jail along with their incarcerated mother is not desirable at all and must be considered as a last resort when all alternative care options are exhausted.²³⁴ Similarly, the JJ Act prescribes institutionalization of children only when family or community-based alternatives are unavailable.²³⁵

No matter how much we improve the architecture or the physical conditions of prison nurseries, the inherent structural violence of incarceration cannot be eliminated. Prisons

228 See Himanshu Dixit, *Child of Incarcerated Parents: A Deemed Criminal*, 2023 I.L.I. L. REV. 245, 262 (2023).

229 See TATA INST. OF SOC. SCIS., FORCED SEPARATION: CHILDREN OF IMPRISONED MOTHERS (AN EXPLORATION IN TWO INDIAN CITIES) 159 (2002) [<https://perma.cc/HE4V-D8YY>].

230 See *id.* at 161.

231 See Bhandari, *supra* note 12, at 366.

232 G.A. Res. 70/175, *supra* note 65, at r. 29(2).

233 See SUKHRAMANI ET AL., *supra* note 196.

234 See *R.D. Upadhyay v. State of AP & Ors.*, (2006) 3 SCR 1132, at 1142 (India).

235 See Juvenile Justice Act, 2016, § 3(xii) (India).

are institutions designed to punish, surveil, discipline, and confine²³⁶—not places of care, safety, or development.²³⁷ As such, even the most well-intentioned carceral reforms cannot mitigate the profound and lasting harms experienced by children who grow up behind bars. At the same time, separating a child from their mother, who is often their primary caregiving, during their formative years can be equally damaging. The long-term goal must therefore be to decarcerate both mothers and children, while simultaneously investing in non-custodial, community-based models of care that center both maternal and child dignity and rights.

4. Popularizing Non-Custodial Sentences

Non-custodial sentences, community-based programs, and robust support services offer a more effective solution for both mothers and their minor children. I argue that this approach should be extended to mothers of minor children who are their primary caregivers. Such an approach would not only address the needs of children forced to accompany their mothers to prison but also safeguard the well-being of children left on the outside and be in line with Rule 64 of the Bangkok Rules which prescribes non-custodial sentences for mothers with dependent children, where possible and appropriate.²³⁸

Many countries have increasingly started taking into consideration this unique relationship of the mother and child by passing legislation that provides for the option of community-based sentencing for mothers. If such policies can be effectively implemented alongside bail provisions, then it would address the requirements of all mothers: those who are pre-trial detainees and those who are convicted.

In Italy, mothers with children up to the age of ten are permitted in some circumstances to serve their sentences outside until their children reach age ten.²³⁹ Colombia recently passed the Public Utility Act, which states that women who are the primary house runners would be subject to community service and would not be passed through the criminal legal system.²⁴⁰ Argentina has a law that puts mothers of children who are the primary caretaker

236 See generally MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON (Alan Sheridan trans., 2d ed. 1979).

237 See generally ANGELA DAVIS, ARE PRISONS OBSOLETE? (2003).

238 See G.A. Res. 65/229, *supra* note 21, at r. 64.

239 See Legge 8 marzo 2001, n.40, G.U. Aug. 3, 2001, n.56 (It.).

240 See L. 2292, marzo 8, 2023, DIARIO OFICIAL [D.O.] (Colom.).

on house arrest if their child is under five years of age.²⁴¹ Though these laws are also flawed in the manner in which they underscore women's place as a default caregiver,²⁴² they offer a better alternative than prison. By reallocating resources from incarceration to social welfare programs, we can begin to break the cycle of intergenerational incarceration and create healthier, more supportive environments for families.

The newly enacted Bharatiya Nyaya Sanhita prescribes community service for certain offences.²⁴³ This alternative can be offered to mothers who have caregiving responsibilities, with the simultaneous provision of state-run childcare centers that support women and promote their rehabilitation.²⁴⁴

While the proposed prison abolitionist framework may appear to confer differential benefits to women, it is important to note that such provisions would be constitutionally valid under Article 15(3) of the Indian Constitution.²⁴⁵ This provision explicitly empowers the state to create special laws for women and children, acknowledging their unique socio-economic vulnerabilities. Consequently, a law or policy permitting decarceration, sentencing, or bail reforms exclusively for women would not constitute sex discrimination.

Nevertheless, to mitigate concerns about reinforcing gender stereotypes, particularly the perception of women as default caregivers for children, a more inclusive policy could be envisaged. A gender-neutral approach would grant non-carceral sentences to incarcerated individuals who fulfill the role of primary caregivers, irrespective of gender. Such an approach would center caregiving responsibilities as the pivotal criterion rather than the

241 Article 32 of Law 24.660 on sentence execution was amended in 2008, expanding the grounds for granting home detention as a substitute for prison confinement. *See* Law No. 26.472, Jan. 12, 2009 (Arg.). The amendment, originally in Spanish, states, “El Juez de ejecución, o juez competente, podrá disponer el cumplimiento de la pena impuesta en detención domiciliaria: (f) A la madre de un niño menor de cinco (5) años o de una persona con discapacidad, a su cargo,” which translates to “The executing judge, or competent judge, may order the fulfillment of the sentence imposed under house arrest: (f) To the mother of a child under five (5) years of age or of a disabled person under her care.” *Id.*

242 *See, e.g.,* Claudia Alejandra Cardona, *Public Service: An Alternative to Women's Incarceration in Colombia*, INT'L DRUG POL'Y CONSORTIUM BLOG (Aug. 3, 2022), <https://idpc.net/blog/2022/08/public-service-an-alternative-to-women-s-incarceration-in-colombia> [<https://perma.cc/6A4J-V98V>].

243 *See, e.g.,* Bharatiya Nyaya Sanhita, 2024, § 226 (India) (attempt to suicide); Bharatiya Nyaya Sanhita, 2024, § 202 (India) (public servant unlawfully engaging in trade).

244 *See* Chesa Boudin, *Children of Incarcerated Parents: The Child's Constitutional Right to the Family Relationship*, 101 J. CRIM. L. & CRIMINOLOGY 77 (2011).

245 *See* India Const. art. 15(3); *see also supra* note 203.

individual's gender. In the short term, given entrenched societal norms that predominantly position women as caregivers, women would likely derive the most immediate benefit from this framework. However, the policy's long-term trajectory could encourage broader societal and cultural shifts, enabling more equitable distribution of caregiving responsibilities across genders. By fostering an environment where men are increasingly involved in caregiving roles, this approach would advance substantive equality while ensuring that caregiving itself remains at the heart of prison abolitionist efforts.

CONCLUSION

Addressing the complexities of mother-child separation within the criminal justice system requires a nuanced approach, one that considers the immediate needs of children, the impact on their mothers, and the long-term consequences of imprisonment on children, families, and communities.

A key issue with this project is the absence of comprehensive data on children impacted by parental incarceration, both in prisons and on the outside, and the establishment and efficient running of prison nurseries in states across India. This lack of information exacerbates the challenges these children face, including limited access to resources and a lack of institutional support. Such reporting should be made a part of the annual prison statistics that are published by the National Crime Records Bureau, a central government agency under the Ministry of Home Affairs.

Much of the existing literature on this topic relies on self-reported data from parents that is methodologically limited.²⁴⁶ Notably, there is a lack of longitudinal studies tracking the experiences of children from parental arrest to release, both in the short and long term. Additionally, comparative studies between children incarcerated with a parent and those living outside of prison, particularly in the Indian context and from an interdisciplinary perspective, remain scarce. Furthermore, research is necessary to identify the developmental stages during which children most critically require their mothers' presence. There is no justification for the state imposing six as the age limit for children to stay with their mothers in prisons.

246 See SUKHRAMANI ET AL., *supra* note 196.

As the number of children experiencing parental incarceration continues to rise in India,²⁴⁷ it is essential to fill the gap in research and consider both the psychological insights and the lessons learned from other countries. The societal impacts of mass incarceration are well-documented,²⁴⁸ and it is crucial to question the true value of imprisoning mothers. What are we sacrificing in the name of justice, both for the incarcerated individuals and for the children left behind?

Ultimately, the conversation must go beyond policy reform; it must center on justice, abolition, and a radical reimagining of caregiving and community care. The harm inflicted by the current system is evident.²⁴⁹ It is crucial to recognize that punishment, in contrast to liberal conceptions of justice, does not affect the individual alone; its consequences ripple out to the larger society, including the families and communities of the incarcerated. As British criminologist Shadd Maruna observes, “It is impossible to isolate punishment as practiced in most societies to a single individual, when we are all connected in families, communities, and societies.”²⁵⁰ In this sense, the justice system’s failure to consider the broader social ramifications of punishment constitutes a breach of its duty of care towards the most vulnerable members of society.

India’s justice system is rooted in liberal values, as it tends to focus on the individual defendant and often ignores the collective impact of punishment on families and communities. A shift toward a communitarian approach to justice would recognize the inevitable suffering of those materially and emotionally tied to prisoners—individuals whose experiences are often overlooked in both theoretical debates and policy decisions.²⁵¹ Abandoning a strictly individualistic perspective forces us to confront the reality that punishment, particularly imprisonment, often extends far beyond the person incarcerated and harms innocent parties, most notably their children. The issue of children living in prison provides a compelling entry point for initiating broader abolitionist conversations, as it starkly reveals the systemic flaws of a carceral approach that subjects children to such environments.

247 See NAT’L CRIME RECS. BUREAU, *supra* note 3, at xiii. There were 1,628 children in women’s prisons as of December 31, 2020. This number has increased over time to 1,764 as of December 31, 2022. *Id.* at 41.

248 See, e.g., Bruce Western & Becky Pettit, *Incarceration & Social Inequality*, 2010 DÆDALUS 8 (2010).

249 See generally DAVIS, *supra* note 237.

250 Shadd Maruna, *Time to Get Rid of the Skid Bid? What Good Are Short Stays of Incarceration?*, 665 ANNALS AM. ACAD. POL. & SOC. SCI. 98, 100 (2016).

251 See generally SUKHRAMANI ET AL., *supra* note 196.

Many studies draw on John Bowlby's "attachment theory," which suggests that separation from parents is generally harmful to children.²⁵² However, and as established in this Article, it is simultaneously important to recognize that prison nursery policies, while well-intentioned, cannot effectively work in carceral spaces. They also inadvertently reinforce patriarchal norms by positioning mothers as the default caregivers. In advocating for the release of mothers from prisons and for community-based alternatives, this Article recognizes the exceptional status of mothers. However, it is also cautious not to reinforce harmful gender stereotypes about caregiving.²⁵³ The call for abolition is not merely about freeing mothers from prison; it is about transforming the underlying structures that perpetuate inequality—both within and outside prison. Our immediate goal should be the decarceration of mothers and their children, but our long-term vision must aim at creating a society where caregiving is shared equitably and not solely the burden of women.

The current carceral ecosystem has long been taken for granted, with outdated policies and practices rarely questioned or revised. Ultimately, a more humane approach to justice requires a focus on the well-being of both mothers and children. While implementing standardized policies for such a small and specific group of beneficiaries may seem challenging, it is essential to recognize that even small numbers of affected individuals deserve comprehensive and compassionate consideration.

252 See John Bowlby, *Attachment Theory and Its Therapeutic Implications*, 6 *ADOLESCENT PSYCHIATRY* 5 (1978).

253 As stated in Part III above, a possible way to address the issue of policy interventions further reinforcing harmful stereotypes is by introducing a policy that grants incarcerated individuals who are primary caregivers of minor children a non-carceral sentence under similar circumstances. This approach would shift the focus from gender to the caregiving role itself, ensuring that caregiving, rather than gender, becomes the central criterion for such considerations. Naturally, given societal norms and expectations, women—who comprise the majority of caregivers—would disproportionately benefit from these non-carceral sentences in the short term. Simultaneously, efforts must be made to implement policies and cultural initiatives that encourage men to take on more active caregiving roles. This would also create a possibility that in the long term, the policy would benefit fathers as well. This would help distribute the caregiving burden more equitably over time, preventing it from remaining disproportionately placed on mothers.